Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM 1994

PENROD DRILLING CORPORATION

Petitioners

VERSUS

EARL WAYNE COATS

Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In a General Maritime Law case, is the principle of joint and several liability incompatible with the principle of comparative fault, which has already been adopted into the General Maritime Law of the United States, and with the requirement of justice that the parties stand equal before the court?

CERTIFICATE OF INTERESTED PARTIES PURSUANT TO RULE 21.1(B)

The undersigned counsel of record certified that the following listed persons have an interest in the outcome of this appeal. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal pursuant to Local Rule 13(a).

1. Penrod Drilling Corporation;
2. Maritime Industrial Services, Inc.;
3. Earl Wayne Coats;
4. Herbert, Mouledoux & Bland;
5. Burke & Mayer;
6. Gelpi, Sullivan, Carroll & Gibbens;
7. Bryant, Colingo, Williams & Clark;

8. David L'Hoste;

9. Hytorc, Inc.;

10. Joseph Brochtel;

11. David Shelton; and

12. Thomas Acosta.

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REFERENCE TO OPINIONS

The decision of the District Court is unpublished. The decision of the Court of Appeals is published as Coats v. Penrod, 5 F.3d 877 (5th Cir., 1993).

JURISDICTIONAL STATEMENT

Petitioner seeks review of the Opinion and Decree of the United States Court of Appeals for the Fifth Circuit entered on October 18, 1993. Suggestions for Rehearing En Banc were filed by two parties, but the Court has not acted on these as of this date.

This Honorable Court has jurisdiction to entertain this Petition for Writ of Certiorari by virtue of Article III of the Constitution of the United States, 28 U.S.C. §1254 and Rule 10, et. seq. of the Rules of the United States Supreme Court.

STATEMENT OF ORIGINAL JURISDICTION

Jurisdiction exists in the trial court by virtue of the court's Admiralty and Maritime Jurisdiction (Article III, § 2 of the Constitution of the United States) and the General Maritime Law of the United States.

STATUTES INVOLVED

There are no statutes applicable to a resolution of this matter.

STATEMENT OF THE CASE

A. COURSE OF PROCEEDINGS AND DISPOSITION IN THE TRIAL COURT

This matter flows from a judgment of the United States District Court for the Southern District of Mississippi, Biloxi Division. The plaintiff, Earl Wayne Coats, sued two defendants, Penrod Drilling Corporation ("Penrod"), and Hytorc M.E., a division of Maritime

Industrial Services ("MIS"), a corporation of the United Arab Emirates. Plaintiff sought damages for injuries which occurred within the course and scope of his employment with MIS, when he was assigned to perform pressure testing services on Penrod's Rig 69 in the Port of Mina Saqr in the territorial waters of the United Arab Emirates.

The District Court applied the General Maritime Law of the United States to this case. It must be emphasized that this is a rare "pure" General Maritime Law case. The Fifth Circuit has affirmed the District Court's determination that Coats was not a seaman under the Jones Act (46 U.S.C. §688), nor a worker covered by the Longshore and Harbor Workers' Compensation Act (33 U.S.C §901, et. seq.), since this

act has no application in foreign countries. Accordingly, no statutes are applicable to this situation.

At trial, the jury found that plaintiff, Earl Wayne Coats, was 20% at fault, MIS was 60% at fault, and Penrod was 20% at fault. The jury awarded total damages of $925,000. After reducing the award by the plaintiff's comparative fault, the District Court, over the objection of Penrod, entered judgment in the amount of $740,000, plus interest, jointly and severally against Penrod and MIS. Under the principles of joint and several liability as they presently exist in the General Maritime Law, although Penrod was found liable for only 20% of the judgment amount, plaintiff may, at his sole option, collect his entire

judgment from Penrod, leaving to Penrod the task of collecting back from MIS the 60% share of the judgment for which MIS was found liable. Penrod bears the sole risk of the uncollectability of the remainder of the judgment from MIS. In that event, Penrod will pay four times the amount the jury cast it in damages, a result which is undeniably unfair and unjust.

Penrod respectfully requests this court's consideration of the propriety of the continued application of joint liability principles in the General Maritime Law of the United States.

B. COURSE OF PROCEEDINGS AND DISPOSITION IN THE APPELLATE COURT

All parties filed timely notices of appeal. On October 18, 1993, the panel of the United States Court of Appeals for the

Fifth Circuit, with a dissenting opinion by Judge DeMoss, and affirmed the District Court's judgment, including the rendering of judgment in the amount of $740,000 jointly and severally against the two defendants. Suggestions for Rehearing En Banc were filed by Penrod and MIS, but the Court of Appeals has not yet acted on these requests.

STATEMENT OF FACTS

On the date of this accident, Penrod's Rig 69 was located in the Port of Mina Saqr within territorial waters of the United Arab Emirates and the rig was jacked-up with its hull out of the water. The rig was as close to shore as possible and access to the rig was via a gangway from the rig to the shore. The rig's crane was capable of reaching the roadway

on shore in order to load and discharge items from trucks on the roadway.

Earl Wayne Coats was employed by MIS, a United Arab Emirates corporation. Coats was living in the U.A.E. with his father, who worked in the U.A.E. for another company, and Coats had a U.A.E. work permit. The primary business of the Hytorc Division of MIS was providing hydraulic-operated torque wrench services for assembling and disassembling oil well equipment on drilling rigs working in the area. After some minimal in-house experimentation, the management of MIS hypothesized that the hydraulic pumps which powered its torque wrenches could be adapted to provide hydraulic pressure for pressure testing of equipment on rigs. Prior to the date of the accident, MIS

solicited Penrod's U.A.E. field office, offering its services to provide pressure testing of equipment on Penrod's Rig 69. Shortly before the date of the accident, Penrod engaged MIS to provide pressure testing services.

For the second day of the Penrod pressure testing job, MIS re-assigned its employee who had been on the job and assigned the plaintiff, Earl Wayne Coats, to substitute aboard the Penrod rig. Coats had no prior experience conducting pressure testing and his training in pressure testing consisted of a short meeting with his MIS supervisor at 11:00 p.m. on the preceding evening. On the date of the accident, while Coats was conducting pressure testing operations, a piece of equipment failed under pressure.

Mr. Coats, who had left a position of safety and had exposed himself to the items under pressure, was struck by pressurized fluid and knocked to the deck of the rig, resulting in an injury to his knee. At trial, the jury determined that the accident was 60% the fault of MIS, 20% the fault of the plaintiff himself, and 20% the fault of Penrod.

SUMMARY OF THE ARGUMENT

Penrod and plaintiff were each found by the jury to have been 20% at fault for Coats' accident, and MIS was determined to have been 60% at fault. The Court entered judgment against Penrod jointly and severally liable with MIS, thus exposing Penrod to payment of 100% of the judgment amount. Joint and several liability is incompatible with the principles of

comparative fault. A defendant's liability should not increase beyond its proportionate share of responsibility due to another defendant's fault any more than its liability should increase due to plaintiff's fault. Penrod and plaintiff were found equally at fault and taken together their fault is substantially less than the fault of MIS; yet Penrod is exposed to 100% of the judgment. This is inequitable.

Joint liability was adopted into the General Maritime Law of the United States from the British Common Law in the 19th Century. Joint liability is historically one of two counterbalancing principles arising out of the legal theory of the 19th Century that all parties are responsible for all of the consequences of

their negligence. Thus, under the theory of that era, a plaintiff who was at fault in the slightest degree would bear all the consequences of his negligence and could recover nothing. This was the principle of contributory negligence. At the same time, a defendant who was slightly at fault would be held jointly liable with his co-defendants, and would bear all the consequences of his slight negligence should the innocent plaintiff chose to recover the entire judgment from the slightly negligent, but jointly liable, defendant. This was the counterbalancing principle of joint liability. Neither was fair nor just, but neither side had any advantage under these counterbalancing principles. Today, the contributory negligence half of the couplet has given

way to proportionate fault. Joint liability must give way as well, and for the same reasons.

Well over a majority of the states have abolished or modified the joint and several liability doctrine. There is a policy consensus among the states that the doctrine of joint liability is unsuited to a comparative fault environment. The application of joint and several liability is unfair and inequitable.

ARGUMENT

MAY IT PLEASE THE COURT:

In a General Maritime Law case, is the principle of joint and several liability incompatible with the principle of comparative fault, which has already been adopted into the General Maritime Law of the United States, and with the

requirement of justice that the parties stand equal before the court?

> "The law is no respecter of persons, and all persons...stand equal before the law and are to be dealt with as equals in a court of justice."

With those words, United States District Judge Charles Pickering began his charge to the jury which decided this case. At trial, Penrod and Coats stood as equals in the eyes of justice and after trial they stood as equals in the eyes of the jury with respect to responsibility for the accident and damages. Yet, under the principles of joint and several liability, Penrod finds itself facing a payment of over $800,000.00 to satisfy a verdict in which the jury found that Penrod's proportional responsibility for the total damages was only $185,000.00, precisely

the same extent to which the plaintiff was himself found responsible. Penrod and Coats were both found by the jury to have been tortfeasors and it was determined that the fault of each contributed 20% to the accident. Coats was not an innocent party.

If Coats is unable to collect the 60% of his damages attributed to MIS, then this is unfair and unjust. However, if under joint and several liability, Penrod has to pay Coats the 60% of his damages that the jury attributed to the fault of MIS, that is equally unfair and unjust, as Penrod is no more and no less responsible for Coats' damages than is Coats himself. This is not equal treatment of parties who are entitled to be treated as equals in the eyes of the law and justice, and who

are equally responsible for the damages in this case.

The decision below suggests that it is not unjust to place the risk of non-recoverability from MIS solely on Penrod, as the decision to do business with MIS was that of Penrod, not Coats. While this is true, it is equally true that the decision of Coats to accept employment with MIS and thereby himself "do business" with MIS was solely that of Coats, not Penrod.

The General Maritime Law is a body of law developed by the judiciary and applicable in maritime cases in the absence of a relevant governing statute. East River S.S. Co. v. Transamerica Delaval, Inc., 476 U.S. 858 106 S.Ct. 2295 90 L.Ed.2d 865 (1986); United States v.

Reliable Transfer Co., 421 U.S. 397, 409, 95 S.Ct. 1708, 1714, 44 L.Ed.2d 251 (1975); Knickerbocker Ice Co. v. Stewart, 253 U.S. 149, 160-161, 40 S.Ct. 438, 440, 64 L.Ed. 834 (1920). "Drawn from state and federal sources, the General Maritime Law is an amalgam of traditional common-law rules, modifications of those rules, and newly created rules." East River, supra, at 2299; Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625, 630, 79 S.Ct. 406, 409, 3 L.Ed.2d 550 (1959); Romero v. International Terminal Operating Co., 358 U.S. 354, 373-375, 79 S.Ct. 468, 480-481, 3 L.Ed.2d 368 (1959).

As the this Honorable Court recognized in Reliable Transfer, supra, it is the duty of the courts to re-examine the rules of the General Maritime Law and

to appraise the validity of their underpinnings and the propriety of their continued application. In Reliable Transfer, supra, this Court noted that the "divided damages rule", which had been adopted from British law in 1855, no longer appeared to achieve justice, had been criticized by other courts as unfair, illogical, unjust and arbitrary, and had been rejected by most other jurisdictions. The result achieved by the rule "'hardly commends itself to the sense of justice any more appealingly than does the common law doctrine of contributory negligence...' G. Gilmore and C. Black, The Law of Admiralty 528 (2nd Ed., 1975)." (Reliable Transfer, 421 U.S. at 407, 95 S.Ct. at 1713.) Precisely the same can be said of the continued application in the

General Maritime Law of the doctrine of joint and several liability.

Joint liability is a common law concept which was adopted into the General Maritime Law in The Phoenix Insurance Company v. The Steamboat Atlas, 93 U.S. 302 (1876). The common law at that time considered that every person was responsible for all of the consequences resulting from his own fault. If a plaintiff was at fault in the least, he recovered nothing; if one defendant was at fault in the least, the innocent plaintiff could elect to recover all of his damages from that defendant, regardless of the degree of fault of another defendant. Justice Clifford set forth these concepts in detail in writing for this Honorable Court in The Atlas, supra. The key factor

in the common law dichotomy of contributory negligence/joint liability is that the plaintiff must have been without fault, or he recovered nothing, in which case joint liability was not an issue. Repeatedly, in The Atlas, supra, Justice Clifford refers to "the innocent party" being entitled to full compensation, "parties without fault" bearing no loss, "innocence" entitling the loser to full compensation from the wrongdoer, and the wrongdoer being liable to the "innocent loser". It is clear that the common law had developed a trade-off. Contributory negligence was unfair to slightly liable plaintiffs and joint liability was equally unfair to slightly liable defendants.

This Honorable Court in Edmonds v. Compagnie General Transatlantique, 443

U.S. 256, 99 S.Ct. 2753, 61 L.Ed.2d 521 (1975), recognized that the contributory negligence of the plaintiff did not affect his ability to recover under joint liability in maritime cases. Thus, The Atlas was interpreted as having adopted into the General Maritime Law only one-half of the common law dichotomy of contributory negligence/joint liability.

Virtually every jurisdiction in this country has rejected contributory negligence as a bar to recovery by plaintiffs and the majority of states have now rejected the counterbalancing inequity to defendants - joint liability. Although the Fifth Circuit in Simeon v. T. Smith & Son, Inc., 852 F.2d 1421 (5th Cir. 1988), rejected a prior argument on this point, the decision in Simeon was based in part

upon the consideration set forth by the court on page 1429 of the opinion that:

> **"most jurisdictions which have adopted comparative negligence have retained the common law rule of joint and several liability"**, quoting W. Prosser and P. Keeton, Prosser and Keeton on the Law of Torts §67 at 475 (1984).

This ten year old observation by these respected scholars is no longer true. Today, almost three-fourths of the states have repealed the inequity of joint liability. The continued use of the traditional joint and several liability doctrine has been much criticized, and in fact has been modified by a majority of the states. At least thirty-three states have either abolished or modified joint and several liability.[1] Utah, Wyoming,

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[1] Pressler and Schieffer, Joint and Several Liability: A Case for Reform, 64 Den. L.Rev. 651, 656.

North Dakota, Kansas, Ohio and New Mexico have completely eliminated joint and several liability.[2]

Other states have modified the doctrine such that it would be inapplicable to the facts of the case at bar.[3] Other states have modified the

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[2] See Utah Code Ann. Section 78-27-38 (1988); Wyo. Stat. Section 1-1-109 (D)(1988); N.D. Cont. 32-03.2 (1987); Ohio Rev. Code Ann. Section 2315.19 (A)(2) (1981); Brown v. Keill, 580 P.2d 867 (Can.) (1978).

[3] Washington, Wash. Rev. Code Section 4.22.070 (1989); Arizona, Arz. Rev. Stat. Ann. Section 12-2506 (1988); Georgia, Ga. Code Ann. Section 51-12-33 (1988); Idaho, Idaho Code Section 6-803(3)-(7); Missouri, Mo. Rev. Stat. Section 509.050.41 (1988); Montana, Mont. Code Ann. Section 27-1-703(2)(3) (1987); New Mexico, N.M. Stat. Ann. Section 43-3-1 (1986); Iowa, Iowa Code Ann. Section 668.1-668.3, 619.17 (1988); Oklahoma, Boyles v.

doctrine of joint and several liability in a variety of ways, usually making a defendant liable for some but not all of a judgment, in excess of its proportion at fault.[4] This development, in so many

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Oklahoma, Natural Gas Co. 619 P.2d 613 (Okla).

[4] Nevada, Nev. Rev. Stat. Section 41.141(3) (1986); Texas, Tex. Rev. Stat. Ann. Art. 2212(a) (1988); Indiana, Ind. Code Ann. Section 34-4-33-5 (1988); Louisiana, La. Civ. Code Ann. Art. 2324 (1988); Oregon, Or. Rev. Stat. Section 18.485 (1985); Pennsylvania, 42 PA Cons. Stat. Ann. Section 7102(b) (1982); Minnesota, Minn. Stat. Ann. Section 604.01(1) (1988); Alaska, Ala. Stat. 09.17.080 (1988); Connecticut, Conn. Stat. Section 52-Section 72(h) (1988); Florida, Fla. Stat. Section 768.81 (1981); Illinois, Ill. Rev. Stat. Section 110 (1988); Michigan, Mich. Comp. Laws Ann. Section 6006304 (1987); Minnesota, Minn. Stat. Section 604.02 (1989); New Hampshire, N.H. Rev. Stat. Ann. Section 507-B:9 (1988); New York, N.Y. Civ. Proc. Section 1601, 1602 (1987); West Virginia, W.Va.

jurisdictions, arises from the understanding that the traditional rule of joint and several liability is not compatible with the comparative fault system:

> "The principle of loss apportionment by shares of negligence that isolates a defendant from liability to the plaintiff for loss due to plaintiff's negligence also should serve to isolate a defendant from liability for loss to the plaintiff attributable to the negligence of another defendant."[5]

The action of approximately two-thirds of the states in enacting

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Section 55-7B-9 (1988); California, Cal. Civ. Code Section 1431.1-5 (1988); South Dakota, S.D. Certified Laws Ann. Section 15-8-15.1 (1988).

5 Pearson, Apportionment of Losses Under Comparative Fault Laws - An Analysis of the Alternatives, 40 La.L.Rev. 343, 362 (1980).

legislation acknowledging the need for changing the law of joint and several liability should be recognized as a fundamental statement of policy, and an occasion for appropriate change in the maritime law. An example is the Supreme Court's adoption of a general maritime law wrongful death remedy in Moragne v. States Marine Lines.[6] In discarding the former rule that the maritime law provided no remedy for a death in state territorial waters, the Court was most influenced by the adoption of wrongful death remedies, modifying the common law, by virtually all state legislatures and Congress:

> "We need not, however, pronounce a verdict on whether The Harrisburg, when decided, was a

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[6] Moragne v. States Marine Lines, 398 U.S. 375, 90 S.Ct. 1772 (1970).

correct extrapolation of the principles of decisional law than in existence. A development of major significance has intervened, making clear that the rule against recovery for wrongful death is sharply out of keeping with the policies of modern American maritime law. This development is the wholesale abandonment of the rule in most of the areas where it once held sway...
..."

These numerous and broadly applicable statutes taken as a whole make it clear there is no present public policy against allowing recovery for wrongful death. The statutes evidence a wide rejection by the legislatures of whatever justifications may once have existed for a general refusal to allow such recovery. This legislative establishment of policy carries significance beyond the particular scope of each of the statutes involved. The policy thus established has become itself a part of our law, to be given its appropriate weight, not only in matters of statutory construction but also in those of decisional law. [citation omitted]

> It has always been the duty of the commonlaw court to perceive the impact of major legislative innovations and to interweave the new legislative policies with the inherited body of commonlaw principles, many of them derived from earlier legislative exertions."[7]

This Honorable Court recently reaffirmed the duty of admiralty courts to look to legislative developments. "In this era, an admiralty court should look primarily to these legislative enactments for policy guidance".[8]

The action of the state legislatures is a sure indication that the traditional doctrine of joint and several liability is

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7 Moragne v. States Marine Lines, 398 U.S. 375, 90 S.Ct. 1772, 1781-83 (1970).

8 Miles v. Apex Marine Corp., 111 S.Ct. 317, 323 (1990).

unsuited to the modern environment of comparative fault. The state legislation on this subject indicates a policy decision that the law must balance plaintiff's interest in obtaining as much as possible against the interests of the defendant in paying no more than his percentage of fault the jury has established as due. This court should, in the exercise of its powers as an admiralty court, acknowledge the change in social policy, and craft an appropriate modification in the law of joint and several liability.

The dual inequities of contributory negligence/joint liability, taken together, do not make any sense nor do they serve justice. Clearly, neither taken separately can be justified.

Joint liability is judge-made law, not statutory law. As this Honorable Court pointed out in Reliable Transfer, supra, where a judge-made rule of maritime law simply replaces one unfairness with another unfairness and creates a result which is not just and equitable, and where the rule exists due to the inertia of age rather than due to merit, the court should change it. This was also the position taken by the dissent in Edmonds, supra.

The panel in the Court of Appeals felt itself constricted by the "policy established by the Supreme Court" in Edmonds. However, Justice White, writing for this Court in Edmonds, made it clear that the law under consideration was "an interface of statutory and judge-made law." (Edmonds, 433 U.S. at 272, 99 S.Ct.

at 2762.) As Justice White stated at the outset, "once again, we have before us a question of the meaning of the 1972 Amendments [to the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §901 et. seq.]." (Edmonds, supra, 433 U.S. at 259, 99 S.Ct. at 2756.) Justice White clearly stated in Edmonds, supra, that the Court was not free to change a judge-made rule which had been relied on by Congress in reaching a delicate balance of the rights of the parties in the 1972 Amendments to the Longshore and Harbor Worker's Compensation Act.

That is not the case here. This is a pure General Maritime Law case. It is not a Jones Act case like Simeon, supra, and it is not a LHWCA case like Edmonds, supra. There are no constricting statutes

involved here and there is no interface between judge-made law and statutory law. Congress has not passed any law applicable to this case in reliance on the continuation by the courts of the doctrine of joint liability in pure general maritime law cases. Edmonds, supra, should not have controlled the Fifth Circuit's consideration of Simeon, supra, on the General Maritime Law question and Edmonds, supra, should not control this case, contrary to the belief of the Fifth Circuit panel. No longer do a majority of jurisdictions in the country continue to apply the doctrine of joint liability, as was the case when Simeon, supra, was decided.

Penrod and Coats are equally responsible for the accident and damages

in the case. All considerations of justice and fairness lead to the conclusion that they should share equally in the risk of the inability to collect the judgment against MIS. Coats was the employee of MIS; he was not a stranger. He accepted a job in the U.A.E. and moved there, allegedly to make a career for himself in the Middle East. Coats had no reservation about going to the U.A.E. to work for MIS, and he has no complaint about going there to collect his judgment. The fact that Coats was the injured party is equally his own fault as it was Penrod's and this fact affords him no additional rights.

CONCLUSION

The joint liability issue should be considered by this Honorable Court because

this issue is one of exceptional importance. Joint liability no longer achieves justice; it is unfair, illogical, unjust and arbitrary; it has been rejected by most of the states. The result achieved by application of the rule "hardly commends itself to the sense of justice." The situation here is indistinguishable from the situation this Honorable Court faced in deciding Reliable Transfer, supra. The contributory negligence half of the contributory negligence/joint liability couplet has given way to the proportionate fault rule. It is time for joint liability to give way as well. The General Maritime Law is an evolving body of law, consisting of old rules, modified rules and new rules. It is not an anachronism of outdated

concepts. The liability of parties to a general maritime law action is now determined proportionately. It follows inexorably that parties who have been found proportionately at fault must share proportionately in the risk of the inability to collect on the judgment from another party also at fault. Only then will justice be served.

Certiorari should be granted for consideration of this important issue.

RESPECTFULLY SUBMITTED:

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing brief has been served on all counsel of record list below by depositing same in the United States Mail, postage prepaid, addressed to them at their respective offices, this 14th day of January, 1994.

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Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

In the
Supreme Court of the United States

OCTOBER TERM 1994

PENROD DRILLING CORPORATION

Petitioners

VERSUS

EARL WAYNE COATS

Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI

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APPENDIX A

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION**

EARL WAYNE COATS — **Plaintiff**

VERSUS — **CIVIL ACTION: 889-0209(P)(R)**

PENROD DRILLING CORPORATION, HYTORC, N.E., DIVISION OF MARITIME INDUSTRIAL SERVICES, in personam, and PENROD RIG NO. 60. in rem — **Defendants**

April 3, 1992

PICKERING, District Judge

JUDGMENT

This matter having come on to trial and the jury having rendered its verdict in this matter, the Court now enters judgment as follows:

With respect to the claims of injury under the General Maritime Law as a result of Plaintiff's accident of April 12, 1988,

and considering the response of the jury to the Interrogatories propounded by the Court in the trial of this matter on February 28, 1992, the Court finds and orders as follows:

The jury's award of damages in the amount of $925,000.00 must be reduced and apportioned pursuant to the principle of comparative fault. The jury found liability of the parties in the following percentages:

Plaintiff, Earl Wayne Coats	20%
Defendant, Penrod Drilling Corp.	20%
Defendants, Hytorc, M.E., Division of Maritime Industrial Services, Ltd.	60%

When the amount determined by the jury as Plaintiff's damages, $925,000.00, is reduced by twenty percent (20%) to account for Plaintiff's percentage of

fault, Plaintiff's recoverable damages amount to a total sum of $740,000.00 on his general maritime claims.

IT IS THEREFORE, ORDERED AND ADJUDGED that there be judgment entered in favor of Plaintiff, Earl Wayne Coats, against Defendants Penrod Drilling Corporation, Hytorc, M.E., Division of Maritime Industrial Services, Ltd., jointly and severally, in the total amount of $740,000.00 with no reduction for medical expenses already paid by Defendant Hytorc. Post Judgment interest shall begin to accrue on said amount from and after March 2, 1992, until paid. There shall be no award of prejudgment interest on this amount.

SO ORDERED AND ADJUDGED this 3rd day of April, 1992.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 92-7378

EARL WAYNE COATS, Plaintiff-Appellee,
Cross-Appellant,

VERSUS

PENROD DRILLING CORPORATION,
ET AL., Defendants,

PENROD DRILLING CORPORATION,
AND HYTORC, M.E.,
Defendants-Appellants,
Cross-Appellees.

Appeal from the United States
District Court for the Southern
District of Mississippi

Date:

Before KING, HIGGINBOTHAM, and DEMOSS, Circuit Judges.

HIGGINBOTHAM, Circuit Judge:

This is a maritime personal injury suit filed by a United States citizen

against his employer, a corporation formed under the law of the United Arab Emirates, and the owner and operator of a jack-up drilling rig, a Delaware corporation with its principal place of business in Dallas, Texas. Plaintiff was injured aboard the rig off the coast of the United Arab Emirates. Under the general maritime law of the United States, a jury determined that the rig was unseaworthy, that its owner and plaintiff's employer were negligent, and awarded substantial damages. The employer appeals the district court's denial of its motion to dismiss for lack of personal jurisdiction, the application of American law, and the failure to dismiss based on forum non conveniens. The defendant appeals, urging us to abolish or modify the doctrine of

joint and several liability in the context of comparative fault as well as reverse the district court's application of American law. Plaintiff cross-appeals the court's ruling that he was not a Jones Act seaman, the sufficiency of the evidence to support the jury's finding of contributory negligence, the directed verdict for defendants denying punitive damages under the general maritime law, the denial of prejudgment interest, and the amount of costs awarded. We affirm.

I.

MIS is a corporation organized under the laws of Ras Al-Khaimah, United Arab Emirates with branch offices in Dubai and Abu Dhabi. It performs repair and maintenance services for oilfield and marine vessels, and its employees are all

expatriates, primarily from India, Pakistan, and the United States. MIS uses Lee's Materials Services, Inc. in Houston, Texas to perform various services in the United States. Through Lee's, MIS advertised its job openings in the Houston Chronicle (Texas), Lafayette Advertiser (Louisiana), and Mobile Register (Alabama). During his trip, Shelton held a meeting in Laurel, Mississippi that was attended by several young men, including the plaintiff, Earl Wayne Coats, Shelton explained that he was soliciting employees to operate MIS equipment on certain offshore vessels.

In 1987, David Shelton, manager of the Hytorc Division of Maritime Industrial Services, travelled from the United Arab Emirates to Mississippi for vacation and

to interview prospective employees for MIS. At the meeting, Shelton offered a job to Coats, and Coats accepted. Their agreement included thirty days per year of paid vacation with airfare back to Mississippi. MIS also promised to pay for Coats' return to Mississippi at the termination of his employment. The term of Coats' employment was indefinite. Coats obtained an updated passport as instructed by Shelton, and MIS, through Lee's Materials, sent him a plane ticket to Dubai. Coats arrived in the United Arab Emirates and started work on December 1, 1987.

While working for MIS, Coats lived on shore and worked on various jack-up rigs owned by different customers of MIS. The majority of Coats' work consisted of

operating a hydraulically powered torque wrench used to loosen and tighten large nuts and bolts. During Coats' employment with MIS, Penrod Drilling Corporation, a Delaware corporation with its principal place of business in Dallas, Texas contracted for MIS to perform pressure testing on Penrod's Rig 69. The pressure testing was necessary to prepare the rig for its next drilling operation. At the time, Rig 69, a jack-up drilling rig, was located in the Port of Mina Saqr in the territorial waters of the United Arab Emirates. It was twenty feet from shore in forty feet of water and connected to land by a gangway. Rig 69 files the United States flag, and its home port is New Orleans, Louisiana. Penrod maintained a local office in the United Arab Emirates

to assist in the operation of Rig 69.

MIS assigned Coats to perform the pressure testing for Penrod. Coats was inexperienced at this task and had to ask for assistance from Penrod personnel. As Coats was working aboard Rig 69, Penrod's "bullplug" failed at a pressure less than it was rated to withstand, causing the fluid under pressure to erupt. The eruption knocked Coats down, resulting in a severe and disabling injury to his knee. After the accident, MIS flew Coats to Hattiesburg, Mississippi for treatment and started paying his medical expenses. Most of these payments were made through Lee's Materials. Meanwhile, MIS filled Coats' job with Chris Stennett, another Mississippi resident who attended Shelton's meeting in Laurel.

On April 10, 1989, Coats sued Penrod, MIS, and Lee's[1] in the Southern District of Mississippi. The complaint asserted federal jurisdiction based on diversity of citizenship and admiralty and alleges, inter alia, negligence on the part of Penrod and MIS, the unseaworthiness of Rig 69, and entitlement to maintenance and cure from MIS under the Jones Act. Soon thereafter, MIS terminated its payment of benefits to Coats. Coats then amended this complaint against MIS to seek compensatory and punitive damages under the general maritime law for wrongful termination of maintenance and cure and to allege wrongful termination of health insurance benefits under ERISA. Penrod

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[1] The District court granted Lee's motion for summary judgment and dismissed it from the case.

cross-claimed against MIS for indemnity and contribution under the general maritime law.

Before trial, the district court issued a number of orders in response to motions filed by the parties. The court ruled that MIS had sufficient contacts with Mississippi to justify the assertion of personal jurisdiction and that it would apply United States law, rather than the law of the United Arab Emirates, to Coats' personal injury claims. Under American law, the court determined that Coats was not a Jones Act seaman, and therefore not entitled to maintenance and cure damages, but that Coats qualified as a Sieracki seaman with the attending right to sue under the warranty of seaworthiness. See Seas Shipping Co. v. Sieracki, 328 U.S. 85

(1946).[2] The court also declined to dismiss the case under the doctrine of forum non conveniens.

The case proceeded to trial on Coats' claims against Penrod for negligence and unseaworthiness and against MIS for negligence, wrongful termination of maintenance and cure, and wrongful termination of benefits under ERISA. After the court directed a verdict against Coats on his claim for punitive damages based on MIS' termination of maintenance and cure, the jury returned a verdict for Coats, assessing damages of $925,000 and assigning 20% fault to Coats, 20% to

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[2] The court also dismissed Coats' claims under the Longshore and Harbor Workers' Compensation Act because Coats' injuries did not occur "upon navigable waters of the United States." 33 U.S.C. §905(b).

Penrod, and 60% to MIS. The court reduced the award by Coats' comparative fault to $740,000 and entered judgment against Penrod and MIS jointly and severally.[3] The court also awarded costs to Coats in the amount of $7,889.04. All parties appealed.

II.

A.

We first addressed the issue of personal jurisdiction over MIS, a question that requires us to apply Mississippi's

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[3] In an advisory capacity, the jury determined that MIS terminated Coats' medical benefits with the specific intent to discriminate against Coats in violation of ERISA. The court adopted this finding and entered judgment for Coats on his ERISA claims in the amount of $26,524.82, less a credit for $23,335.15 in medical expenses previously paid by MIS to Coats. This judgment was not appealed.

long-arm statute. See DeMelo v. Toche Marine, Inc., 711 F.2d 1260 (5th Cir. 1983).[4] MIS contends that the

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[4] At the time this suit was filed, §13-3-57 provided:

> Any non-resident person, firm, general or limited partnership, or any foreign or other corporation not qualified under the constitution and laws of this state as to doing business herein, who shall make a contract with a resident of this state to be performed in whole or in part by any party in this state, or who shall commit a tort in whole or in part in this state against a resident or non-resident of this state, or who shall do any business or perform any character of work or service in this state shall by such act or acts be deemed to be doing business in Mississippi. Such acto or acts shall be deemed equivalent to the appointment by such nonresident of the secretary of state of the State of Mississippi, or his successor or successors in office, to be the true and lawful attorney or agent of such nonresident upon whom all lawful process may be served in any actions or

Mississippi statute does not confer jurisdiction, and alternatively, that applying the statute to MIS violates due process.[5] The relevant facts are undisputed, and thus our review of this issue is de novo. Command-Aire Corp. v. Ontario Mechanical Sales and Serv. Inc.,

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> proceedings accrued or accruing from such act or acts, or arising from or growing out of such contract or tort, or as an incident thereto, by any such nonresident or his, their, or its agent, servant, or employee.
> . . .

Miss. Code Ann. §13-3-57 (Supp. 1988) (amended 1991).

[5] We must address both arguments separately, because the Mississippi courts have not held that the state's long-arm statute reaches to the limits allowed by the Constitution. See Rittenhouse v. Mabry, 832 F.2d 1380, 1383 (5th Cir. 1987); Southern Pac. Transportation Co. v. Fox, 609 So.2d 357, 365 (Miss. 1992) (Lee, P.J., dissenting).

963 F.2d 90, 93 (5th Cir. 1992).

Because Coats' claims are not based on contract and the alleged tortious conduct of MIS occurred in the United Arab Emirates, the district court asserted personal jurisdiction over MIS under the catchall or "doing business" prong of the Mississippi statute. See Jones v. Chandler, 592 So.2d 966, 971 (Miss. 1991) (referring to "doing business" as the catchall provision).[6] The first question is whether MIS was "doing business" in

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[6] The district court found it unnecessary to decide whether MIS' termination of Coats' maintenance and cure benefits constituted an intentional tort committed in whole or in part in Mississippi. We also decline to address this issue.

Mississippi.[7] Under the statute, one is

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[7] The district court applied a three-pronged test for "doing business" that originated in Mladinich v. Kohn, 164 So.2d 785, 790 (Miss. 1964): (1) the non-resident defendant must purposefully do some act or transaction in Mississippi, (2) the cause of action must be connected to or arise from this transaction, and (3) the assumption of jurisdiction must not offend traditional notions of fair play and substantial justice. See also Rittenhouse v. Mabry, 832 F.2d 1380, 1385 (5th Cir. 1987) (applying this test); Aycock v. Louisiana Aircraft, Inc., 617 F.2d 432, 434 (5th Cir. 1980) (same). This is also the analysis employed by the parties on appeal. The two most recent decisions from the Mississippi Supreme Court on this issue, however, did not apply this test, but instead focused on the actual language of the long-arm statute. See Southern Pac. Transportation Co. v. Fox, 609 So.2d 357 (Miss. 1992); McDaniel v. Ritter, 556 So.2d 303 (Miss. 1989). Although we do not infer a substantive change in the law from these decisions, we will follow the most recent guidance from the state's highest court.

"deemed to be doing business" if he "perform[s] any character of work or service in this state." Miss. Code Ann. §13-3-57. In McDaniel v. Ritter, 556 So.2d 303 (Miss. 1989), the Mississippi Supreme Court further defined the term to include doing "various acts here for the purpose or realizing a pecuniary benefit or otherwise accomplishing an object." Id. at 309 (citing Restatement (Second) of Conflict of Laws §35 cmt. a (1971)). The Mississippi Supreme Court recently stated that the doing business prong "is so broad that it belies any suggestion it be limited to commercial activity." Jones, 592 So.2d at 971.

MIS' recruitment and hiring of employees in Mississippi meets the Restatement definition adopted by the

Mississippi Supreme Court. MIS performed various acts in Mississippi to recruit Coats. Shelton, on behalf of MIS, held a meeting in Laurel. At that meeting, MIS hired Coats -- and under terms that contemplated future contacts with Mississippi. MIS agreed to fly Coats back to Mississippi every year of his employment for his thirty-day vacation, and MIS employed Coats for an indefinite term. When Coats was injured, MIS returned him to Mississippi for treatment and started paying for his medical expenses. Moreover, Coats was not the only Mississippi resident MIS recruited and hired. After Coats' accident, MIS replaced him with Chris Stennett, another Mississippi resident who attended Shelton's meeting in Laurel. MIS also

advertised its job openings in newspapers from three neighboring states, and there is evidence in the record that these newspapers are distributed to Mississippi residents. Cf. Rittenhouse, 832 F.2d at 1385 (finding a failure to meet the "doing business" requirement while noting that the defendant did not solicit patients from Mississippi or advertise there). These actions constitute "various acts [in Mississippi] for the purpose or realizing a pecuniary benefit or otherwise accomplishing an object."

Concluding that MIS does business in Mississippi is not by itself sufficient to establish jurisdiction. The nexus requirement must also be met. This is, the "act or acts" performed by MIS in Mississippi will confer jurisdiction only

"in any actions or proceedings accrued or accruing from such act or acts . . . or as an incident thereto . . . ." Miss. Code Ann. 13-3-57 (emphasis added).[8] As explained by the Mississippi Supreme Court,

> [t]he long-arm statute requires no direct nexus to the non-resident's business done here, only that the claim be incident thereto. The statute thus requires far less than that the liability generating conduct have occurred in Mississippi.

McDaniel, 556 So.2d at 309; see also Southern Pac. Transp. Co. v. Fox, 609

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[8] Effective July 1, 1991, the Mississippi legislature amended §13-3-57 and repealed the nexus requirement. The amended statute applies prospectively to actions commenced after its effective date and therefore has no effect on Coats' suit, filed in 1989. Southern Pac. Transp. Co. v. Fox, 609 So.2d 357, 360 n.5 (Miss. 1992).

So.2d 357, 360 (Miss. 1992). McDaniel was a wrongful death action arising from a plane crash in Missouri. Jack Ritter, plaintiffs' decedent, and Alton Jerry Speaks, defendants' decedent, were killed in the accident. Ritter was a Mississippi resident, and Speaks resided in Tennessee. The two men worked for Consolidated Enterprises, a Mississippi corporation with an office in Columbus. Speaks had organized the company and was its principal shareholder. Most important, they were travelling on behalf of Consolidated when the plane crashed. After concluding that Speaks had a continuing and substantial presence in Mississippi, the court held that plaintiffs' claim arose from "facts sufficiently incident to business done by

Speaks in Mississippi" to satisfy the long-arm statute. 556 So.2d at 309. Although the crash occurred in Missouri and the plane never travelled through Mississippi, the fact that they were travelling on behalf of the defendant's corporation which was doing business in Mississippi furnished the required nexus. See id.

In Fox, the court found the required nexus lacking on facts it characterized as "in sharp contrast with McDaniel." 609 So.2d at 361. Fox, a Texas resident, sued his employer, Southern Pacific Transportation Co., to recover for injuries suffered while working in Southern Pacific's railroad yard in Hearne, Texas. Southern Pacific's principal place of business was Lafayette,

Louisiana. Although Southern Pacific did transport goods through Mississippi in interstate commerce, critical to the court was the fact that neither Fox nor his accident had "even the slightest connection with this state or with any business Southern Pacific does here." Id. at 359.

We are persuaded that Coats' claims arise from facts sufficiently incident to MIS's activities in Mississippi to meet the nexus requirement for personal jurisdiction under Mississippi law. MIS held a meeting in Mississippi and recruited Coats to come work for them. This contact with Mississippi resulted in Coats' employment and Coats was injured on the job. Moreover, Coats claims damages, in part, as compensation for his medical

expenses while in a Mississippi hospital, where MIS flew him for treatment. Finally, MIS terminated its payment of Coats' medical expenses while Coats was hospitalized in Mississippi.

B.

Due process requires that a defendant have sufficient minimum contacts with the forum state such that maintenance of the suit does not offend traditional notions of fair play and substantial justice. International Shoe Co. v. Washington, 326 U.S. 312, 316 (1945). The nature and quality of these contacts must justify the conclusion that defendant should have reasonably anticipated being haled into court in the forum state. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980); Jones v. Petty-Ray Geophysical

Geosource, Inc., 954 F.2d 1061, 1068 (5th Cir. 1992). As an analytic device, the Supreme Court draws a distinction between specific and general jurisdiction. See Burger King Corp. v. Rudzewicz, 105 S.Ct. 2174, 2182 (1985); Helicopters Nacionales de Columbia, S.A. v. Hall, 104 S.Ct. 1868, 1872 (1984). For specific jurisdiction, the defendant must have purposely directed his activities at the resident of the forum and, the litigation must result from the alleged injuries that arise out of or relate to the defendant's activities directed at the forum. Burger King, 471 U.S. at 474; Aviles v. Kunkle, 978 F.2d 201, 204 (5th Cir. 1992). The focus is on the relationship between the defendant, the forum, and the litigation. Burger King, 471 U.S. at 474. "The appropriate

inquiry is whether the defendant purposefully availed [itself] of the privilege of conducting activities in-state, thereby invoking the benefits and protections of the forum state's laws." Bullion v. Gillespie, 895 F.2d 213, 216 (5th Cir. 1990) (citing Burger King, 471 U.S. at 474-75). Where the cause of action is not related to or does not arise from the defendant's activities in the forum, the forum may still have general jurisdiction if the defendant's contacts with the forum are of a continuous and systematic nature. Helicopters, 466 U.S. at 414-15. We hold that the exercise of personal jurisdiction over MIS satisfies the Constitution under the specific jurisdiction analysis.

MIS could reasonably anticipate being haled into court in Mississippi as a result of its relationship with Coats. MIS' recruitment activities in Mississippi that led to his hiring, such as holding a meeting in the state and buying ads in papers that circulated in the state, are the sort of "reach[ing] out" to Mississippi that the Supreme Court saw as creating personal jurisdiction in Burger King, 105 S.Ct. at 2186. See also Pedelahore v. Astropark, 745 F.2d 346, 349 (5th Cir. 1984). MIS further cemented that bond by signing a contract obligating it to return Coats there once a year for as long as he worked for MIS.

Then, after Coats' injury, he and MIS jointly decided that he would return to

Mississippi for treatment.[9] MIS flew him thee and began paying his medical bills. Flying an employee to Mississippi and

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[9] Coats testified in his deposition that once it was determined that his injury required surgery:

> He [Mr. Shelton] first suggested that I would fly to Houston. They would do surgery on me in Houston there. He would have me met by members of his family. I would be transported to a hospital. He said he could take care of all the arrangements.

Then Shelton changed his mind and offered Coats another choice:

> [T]he following day he had mentioned to me that if I was going to be in the hospital for so long, that it would be very expensive for my family to have to come to Houston to see me and stay there; that if there was anywhere in Mississippi that I would like to have the surgery done, he could arrange it where I could be transported to Mississippi.

assuming a financial obligation there is not a "random," "fortuitous," or "attenuated" act that is an improper basis of jurisdiction. See Burger King, 105 S.Ct. at 2186. Backing out of that commitment, an act that ultimately cost MIS over $20,000 in the judgment below, was also a choice by MIS that could lead it to foresee appearing in a Mississippi court. See Bearry v. Beech Aircraft, 818 F.2d 370, 375 (1987); Thompson v. Chrysler Motors, 755 F.2d 1162, 1172 (5th Cir. 1985).

Once minimum contacts are shown, a court should decide whether the assertion of jurisdiction would comport with fair play and substantial justice, considering the burden on the defendant, the forum state's interest in adjudicating the

dispute, the plaintiff's interest in obtaining convenient and effective relief, the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and the shared interest of the several states in furthering fundamental substantive social policies. Burger King, 105 S.Ct. at 2184. Requiring MIS to defend this suit in Mississippi would not offend these principles. Coats is a resident of Mississippi, and Mississippi has a strong "interest in providing effective means of redress of its residents." McGee v. Int'l Life Ins. Co., 355 U.S. 220, 223 (1957); see also Holt, 801 F.2d at 780; Pedelahore, 745 F.2d at 349. It was not unreasonably inconvenient to require MIS to defend a suit in Mississippi given that many of its

employees are American. See Burger King, 105 S.Ct. at 2184 ("[t]hese considerations sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required").

III.

A.

Turning to the district court's application of United States law, MIS first argues that the choice of law is between the law of the United Arab Emirates and Mississippi law, rather than the general maritime law. This conclusion rests on the contention that the district court lacked subject matter jurisdiction in admiralty, and therefore, the only basis for federal jurisdiction is diversity. If so, the district court

should have applied Mississippi's choice of law rules in deciding between foreign and state law. See Klaxon Co. v. Stentor Electric Mfg. Co., Inc., 313 U.S. 487, 496 (1941); Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).[10] MIS asserts that Mississippi would apply the law of the United Arab Emirates to this case.[11]

MIS argues that the activity giving rise to Coats' accident does not have a

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[10] Mississippi follows the Restatement Second approach which requires application of the law of the place of injury, absent a more significant relationship with another state. Mitchell v. Craft, 211 So.2d 509, 515 (Miss. 1968).

[11] Penrod has not joined MIS in this argument, apparently, because Penrod's claim for contribution or indemnity against MIS is based on general maritime law. If the law of the United Arab Emirates is not applicable, Penrod may prefer to have general maritime law apply rather than Mississippi law.

sufficient connection to traditional maritime activity to support admiralty tort jurisdiction. See Sisson v. Ruby, 110 S.Ct. 2892 (1990); Executive Jet Aviation v. Cleveland, 409 U.S. 249 (1972). In this circuit, we examine four factors to determine the relationship to maritime activity: (1) the functions and roles of the parties; (2) the types of vehicles and instrumentalities involved; (3) the causation and type injury; and (4) traditional concepts of the role of admiralty law. Kelly v. Smith, 485 F.2d 520, 525 (5th Cir. 1973). Our analysis today is further guided by the Supreme Court's recent pronouncement in Sisson. See also Broughton Offshore Drilling v. South Central Machine, Inc., 911 F.2d 1050, 1052 & n. 1 (5th Cir. 1990)

(applying Kelly after noting that Sisson recognized but neither approved nor disapproved our approach).

Applying the first factor, the functions and roles of the parties, MIS performs repair and maintenance services for oilfield and marine vessels. Penrod is engaged in offshore oil drilling. Penrod contracted with MIS, because Rig 69 needed pressure testing before its next drilling operation. Because "the primary focus of admiralty jurisdiction is unquestionably the protection of maritime commerce," the Supreme Court has considered the effort of an activity on maritime commerce. Foremost, 102 S.Ct. at 2658; Sisson, 110 S.Ct. at 2895; see also Exxon Corp. v. Central Gulf Lines, Inc., 111 S.Ct. 2071, 2074 (1991). The repair

and maintenance of the jack-up drilling rig on navigable waters is certainly a maritime activity with an effect on maritime commerce.

The second factor is the types of vehicles and instrumentalities involved. Coats' injury occurred aboard a vessel on navigable water which strengthens the nexus with traditional maritime activity. That Coats was operating MIS equipment aboard Rig 69 does not diminish the importance of a ship-board injury.

As to the causation and type of injury, the third factor, MIS refers to the fact that Coats was injured while pressure testing, and the cause of the accident was the failure of Penrod's bullplug. These events, MIS contends, could just have easily occurred on land.

Moreover, according to MIS, its negligent failure to train Coats in pressure testing bears no special relation to maritime activities. We are not persuaded that these facts could overcome the otherwise substantial connection with maritime activity. In any event, this factor is entitled to little weight after Sisson, where the Court refused to engage in this sort of detailed inquiry into causation. That case involved a fire that began on a noncommercial vessel at a marina on a navigable waterway. Before judging the nexus with traditional maritime activity, the Court first had to determine the relevant activity involved. As the Court explained,

> Our cases have made clear that the relevant "activity" is defined not by the particular circumstances of the incident,

> but by the general conduct from which the incident arose . . . This focus on the general character of the activity is, indeed, suggested by the nature of the jurisdictional inquiry. Were courts required to focus more particularly on the causes of the harm, they would have to decide to some extent the merits of the causation issue to answer the legally and analytically antecedent jurisdictional question.

110 S.Ct. at 2897. Declining to ascertain the precise cause of the fire, the Court determined the relevant activity to be "the storage and maintenance of a vessel at a marina on navigable waters." Similarly, the relevant activity in this case is the repair and maintenance of a jack-up drilling rig on navigable waters.

Traditional concepts of the role of admiralty, the final factor, also support admiralty jurisdiction. This case arises from a tort that occurred aboard a vessel

on navigable waters. One of the traditional roles of admiralty law is to provide compensation for injuries aboard ship. See Sisson, 110 S.Ct. 2898-02 (Scalia, J., concurring) (arguing that all vessel-related torts fall within the admiralty jurisdiction).

MIS's reliance on Sohyde Drilling & Marine Co. v. Coastal Gas Producing Co., 644 F.2d 1132 (5th Cir. 1981), is misplaced. There, we applied the Kelly factors and concluded that admiralty jurisdiction was lacking in a suit for property damage arising from the blowout of a high-pressure gas well located in a dead-end canal slip in Louisiana. Coastal, the operator of the well, had hired Sohyde to perform workover operations to correct a loss of

production. Critical to the court's decision was its distinction between property damage and personal injury. While denying jurisdiction over the property damage at issue, the court remarked that claims for personal injury suffered on navigable waters would certainly fall within admiralty. Id. at 1136-37; See also Broughton, 911 F.2d at 1052.[12] Therefore, Sohyde actually supports the exercise of admiralty jurisdiction in this case, one involving only personal injury. MIS's arguments are without merit.

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[12] Sohyde has been criticized for its distinction between property damage and personal injury, and we have vowed not to extend it beyond its facts. Broughton, 911 F.2d at 1053. See also Houston Oil and Materials Corp. v. American Int'l Tool Co., 827 F.2d 1049, 1054 (5th Cir. 1987).

B.

Because this is an admiralty case, the Lauritzen-Rhoditis factors govern the choice of law: (1) the place of the wrongful act; (2) the law of the flag; (3) the allegiance or domicile of the injured worker; (4) the allegiance of the defendant shipowner; (5) the place of the contract; (6) the inaccessibility of the foreign forum; (7) the law of the forum; and (8) the shipowner's base of operations. Hellenic Lines, Ltd. v. Rhoditis, 398 U.S. 306, 308-09 (1970); Lauritzen v. Larsen, 345 U.S. 571, 583-91 (1953). "The test is not a mechanical one in which the court simply counts the relevant contacts; instead the significance of each factor must be considered within the particular context

of the claim and the national interest that might be served by the application of United States law." Fogleman v. Aramco, 920 F.2d 278, 282 (5th Cir. 1991). The type of vessel involved in this case, a jack-up oil drilling rig, is particularly relevant to our analysis. "The significance of each factor in a nontraditional maritime context like offshore oil production may vary from that in the traditional shipping context in which the Lauritzen-Rhoditis test arose." Id.; see also Bailey v. Dolphin Int'l, Inc., 697 F.2d 1268, 1275 (5th Cir. 1983) (jack-up drilling rig); Cuevas v. Reading & Bats Corp., 770 F.2d 1371 (5th Cir. 1985) (same); Jack L. Albritton, Choice of Law in a Maritime Personal Injury Setting: The Domestic Jurisprudence, 43 La. L. Rev.

879 (1983) (discussing the difference between "bluewater" and "brownwater" cases). The place of the wrongful act, the allegiance or domicile of the injured, and the place of the contract, which are less important in the shipping context, are more significant in nontraditional cases such as this one. Chiazor v. Transworld Drilling Co., 648 F.2d 1015, 1019 (5th Cir. 1981). Our review of the district court's decision to apply United States law is de novo. E.g. Fogleman, 920 F.2d at 282.

The first factor is the place of the wrongful act. Coats' accident occurred in the territorial waters of the United Arab Emirates, and because this is a nontraditional maritime case, this factor is entitled to considerable weight.

The second factor is the law of the flag. "The law of the flag has traditionally been of cardinal importance in determining the law applicable to maritime cases." Id. (citing Lauritzen, 345 U.S. at 583-84). MIS is not a shipowner and therefore this factor has no specific application to it. Penrod's Rig 69 flew the United States flag. Penrod argues that the flag of the vessel in this case is fortuitous, because Coats was assigned to six different drilling rigs with different owners and allegiances. The record indicates that in addition to the PENROD 69, Coats worked aboard the MARESK VICTORY, the TRIDENT III, the TRANSOCEAN V, the W.T. ADAMS and the SEDCO 91. Penrod, however, does not say what flag each of these vessels flew and we are

unable to find this information in the record. We cannot conclude that Coats' injury aboard a United States flagged vessel, as opposed to a vessel registered in another country, was fortuitous without knowing what flag these other rigs flew.

The third factor is the allegiance or domicile of the plaintiff, and one that gains added significance in this context. Coats is a United States citizen, and despite his move overseas, he maintained his residence in Mississippi. That is where MIS agreed to fly him for his vacations, and that is where he returned after the accident. Nevertheless, defendants contend that Coats' domicile was in the United Arab Emirates. They argue that he moved to that country with the intent to remain, because his job with

MIS was for an indefinite term and one is generally domiciled where he works. In Fogleman, however, the plaintiff was a Louisiana resident who worked in Saudi Arabia for eight years, and we determined his domicile to be in the United States. Therefore, Coats is, a fortiori, domiciled in the United States.

Fourth is the allegiance of the defendant shipowner. Penrod's allegiance is without question to the United States. Rig 69 flies the United States flag and Penrod's principal place of business is Dallas, Texas. MIS is not a shipowner, but we still take into account its organization under the laws of the United Arab Emirates. This allegiance, however, is diminished somewhat by the fact that MIS has no employees from that country and

a large percentage of them are from the United States.

The place of the contract is the fifth factor, and another that is entitled to more weight in this context. As the district court stated, Coats apparently executed an Arabic contract in the United Arab Emirates for the purpose of obtaining a work visa; however, the parties agreed to all of the contract terms in Mississippi. Thus, Coats' employment contract was formed in Mississippi, and this factor favors United States law. Cf. Fogleman, 920 F.2d at 283 (noting that plaintiff signed all eight of his contracts in Saudi Arabia). The contract between MIS and Penrod is not relevant to our analysis. See id. (focusing on plaintiff's contract with his employer

without considering employer's contract with owner/operator of oil platform).

The sixth factor, inaccessibility of the forum, is only relevant to forum non conveniens. Lauritzen, 345 U.S. at 589-90. The seventh factor is the law of the forum. The general maritime law of the United States is the law of the forum; however, this factor is entitled to little weight because, by definition, it supports the law of the forum. Fogleman, 920 F.2d at 283.

The final factor is the base of operations. In the nontraditional context, we have held that "'it is the base from which the rig is operated on a day-to-day basis rather than the base of operations of the corporate or ultimate owner of the rig which is important for

choice of law purposes.'" Id. at 284 (quoting Bailey, 697 F.2d at 1275 n.22). Penrod has a local office in the United Arab Emirates to assist in the operation of Rig 69. The record shows that this office is occupied by the rig superintendent who frequently communicates with Penrod's office in Dallas, Texas by facsimile. We addressed a similar situation in Bailey. There, the local office in Singapore "was in daily contact with the Houston office by telex or telephone, usually providing it with drilling reports." 697 F.2d at 1271 n.6. In addition, "the day-to-day decisions respecting the activities and operations of the [rig] were made by [the area manager] or [the rig manager and drilling superintendent] or by personnel on the

rig." Id. We nevertheless agreed that the base of operations was not in the United States. Id. at 1274. Therefore, we are constrained to find that Penrod's base of operations for purposes of this case is in the United Arab Emirates. MIS's base of operations is also in the United Arab Emirates; it has no offices anywhere else. Despite the business it conducts through Lee's Materials in the United States and the fact that it has a substantial number of American employees, its day-to-day operations are clearly conducted in the United Arab Emirates.

After considering the above factors and giving them the weight they deserve in this offshore oil drilling context, we agree with the district court's decision to apply United States law. Of the

factors deemed more significant in this context, only the place of the wrongful act favors foreign law; the allegiance of the plaintiff and the place of contract refer us to United States law. The law of the flag and the allegiance of the defendant shipowner also point to United States law. In short, the United States has a greater interest in applying its law to this case than the United Arab Emirates. Coats was recruited in the United States, accepted the job while in this country, was supervised by American employees, suffered injury aboard an American ship, and was flown home to recover. See Albritton, Choice of Law, supra (noting that unlikelihood of courts denying the benefit to work overseas and does not give up his permanent United

States residence).

Although prior cases are less instructive in this area, where our analysis must be based on the facts of each case, our decision today is consistent with our precedent. With one exception, our decisions involving nontraditional, "brownwater," vessels have involved a foreign plaintiff injured off the coast of a foreign country seeking the protections of American law. We have uniformly rebuffed these attempts. See, e.g. Cuevas v. Reading & Bates Corp., 770 F.2d 1371 (5th Cir. 1985); Koke v. Phillips Petroleum Co., 730 F.2d 211 (5th Cir. 1984); Bailey v. Dolphin Int'l, Inc., 697 F.2d 1268 (5th Cir. 1983); Vaz Borralho v. Keydril Co., 696 F.2d 379 (5th Cir. 1983); Chiazor v. Transworld Drilling

Co., 648 F.2d 1015 (5th Cir. 1981).

The one exception is Fogleman, where we refused to allow an American plaintiff to sue under United States law for an injury that occurred in Saudi Arabia. Fogleman, a Louisiana resident, went to work for Fluor Arabia in Saudi Arabia. He applied for the job by completing a "Foreign Employment Application" and mailing it to Saudi Arabia. Fluor Arabia is a subsidiary of Fluor Corporation, a Delaware corporation with its principle place of business in California, but is only authorized to do business in Saudi Arabia. Fogleman worked under a series of eight one-year contracts, all signed in Saudi Arabia, and lived aboard a boat flying the Saudi Arabian flag. Fluor Arabia had a contract with ARAMCO, and

pursuant to that contract, Fluor Arabia assigned Fogleman to work with ARAMCO. Fogleman sustained a sharp pain in his chest while transferring from an oil platform to a workboat that flew the Panamanian flag and later suffered a heart attack, allegedly caused by excessive work hours aboard ARAMCO's oil platform. Fogleman sued ARAMCO and Fluor Arabia, and we affirmed the district court's application of Saudi Arabian law to ARAMCO and Fluor Corporation. 920 F.2d at 281.

The contacts with the United States in Fogleman were not as strong as in this case. The vessels involved did not fly the United States flag, and all of the plaintiffs contracts were signed in the foreign country. Moreover, the allegiance of both defendants was foreign. Id. at

282-83. "[T]he only significant factor pointing to the application of United States law [was] the domicile of the plaintiff." Id. at 284. Ad discussed, the connections with the United States in this case are substantial and justify a different result than the one we reached in Fogleman.

IV.

Given our affirmance of the district court's application of the general maritime law, we find no abuse of discretion in the denial of MIS's motion to dismiss for forum non conveniens. The private and public factors to be considered do not overcome the deference due Coats' choice of his home state as the forum and the fact that this case has already been tried. See In re Air Crash

Disaster Near New Orleans, 821 F.2d 1147, 1167 (5th Cir. 1987) (en banc) (stating that "[t]he fact that a trial on the merits has occurred in the plaintiff's selected forum does have some effect on our decision of whether the district court abused its discretion"). MIS has not shown that it was "greatly prejudiced" by having to defend the case in Mississippi. Id. at 1168.

V.

Penrod has devoted much of its energy in this appeal to urging us to abolish or modify the doctrine of joint and several liability. The jury found Penrod and MIS to be 20% and 60% responsible, respectively, but as a result of joint and several liability, Coats can look to Penrod for the entire 80%. Coats would

obtain 80% from Penrod though the jury determined Coats and Penrod to be equally at fault. Thus, Penrod maintains, joint and several liability is incompatible with comparative fault.[13] We rejected this proposition in Simeon v. T. Smith & Son, Inc., 852 F.2d 1421, 1429-30 (5th Cir. 1988), and we are bound by Simeon without the en banc court. But see id. at 1436 (Garwood, J., concurring in part and dissenting in part) (arguing for "modified

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[13] Penrod appears to be motivated in this argument by a fear that the judgment is unenforceable against MIS in the United Arab Emirates, and Penrod may have to absorb the effect of MIS's good fortune. It is true that the doctrine of joint and several liability places such risk of nonrecoverability entirely on the defendants, but we are not convinced that this is an unjust result in this case. The decision to do business with MIS was Penrod's, not Coats.

joint liability").

Additionally, Penrod points out that at least thirty-three states have either abolished or modified the doctrine of joint and several liability and urges us to change the federal maritime law based on this statement of policy. We are well aware of our duty as an admiralty court to look to legislative enactments for policy guidance. Miles v. Apex Marine Corp., 111 S.Ct. 317, 323 (1990); Moragne v. States Marine Lines, 90 S.Ct. 1772, 1781-83 (1970). However, this change in policy among the states is in conflict with the maritime policy recognized in Simeon:

> To date, under general maritime [law], the policy of the Supreme Court has been clear - ensure that injured plaintiffs are made whole, even at the expense of overburdening defendants.

852 F.2d at 1454 (citing Edmonds v.

Compagnie Generale Transatlantique, 443 U.S. 256, 271-72 n.30 (1979)) (King, J., joined by Williams, J., specifically concurring). While a strong statement of policy from the states has much force in this context, that sentiment must nevertheless give way to a contrary policy established by the Supreme Court.

Penrod also contends that applying joint and several liability in the context of comparative fault ignores the jury's findings of fault and thereby amounts to a violation of its right to a jury trial under the Seventh Amendment. Under current law, however, a defendant forced to pay more than its share can recover against its codefendants for contribution based on the jury's findings of fault. Thus, the jury's findings are adhered to.

This system simply forces the defendants to work it out between themselves and ensures the plaintiff that he will in fact recover the judgment. Ideally, the end result with or without joint and several liability is the same.

VI.

Coats' cross-appeal does not raise any grounds for reversal. First, we affirm the district court's summary judgment of seaman status is "an inherently factual question." Barrett v. Chevron U.S.A., Inc., 781 F.2d 1067, 1074 (5th Cir. 1986) (en banc). "Nonetheless, if the requisite proof is absent, a court may decide that seaman status is lacking as a matter of law." Kerr-McGee Corp. v. Ma-Ju Marine Servs., Inc., 830 F.2d 1332, 1335 (5th Cir. 1987). Seaman status is a

jury question only if there is evidence that (1) the plaintiff was "assigned permanently to a vessel . . . or performed a substantial part of his work on the vessel" and (2) the work he performed assisted the vessel in accomplishing its mission or contributed to the function or maintenance of the vessel. Offshore Company v. Robison, 266 F.2d 769, 779 (5th Cir. 1959). The requirement of assignment to a vessel also includes assignment to "an identifiable fleet of vessels." Braniff v. Jackson Ave.--Gretna Ferry, Inc., 280 F.2d 523, 528 (5th Cir. 1960).

Because Coats was not permanently assigned to a vessel and did not perform a substantial part of his work aboard a vessel, his seaman status turns on whether he worked aboard a fleet. A fleet is "an

identifiable group of vessels acting together or under one control." Barrett, 781 F.2d at 1074. Although we have decided that the employer need not be the owner or operator of the group of vessels, Bertrand v. International Mooring & Marine, Inc., 700 F.2d 240, 245 (5th Cir. 1983), we have "reject[ed] the notion that fleet of vessels in this context means any group of vessels an employee happens to work aboard." Barrett, 781 F.2d at 1074. In New v. Associated Painting Servs. Inc., 863 F.2d at 1205, 1208 (5th Cir. 1989), plaintiff, like Coats, worked for an independent contractor that assigned its employees to perform jobs for owners and operators of various vessels. He performed sandblasting and painting aboard vessels owned by at least eight unrelated

entities. He was injured aboard a semi-submersible drilling rig owned by one of these entities and sued his employer under the Jones Act. Id. at 1207 We affirm a summary judgment denying seaman status, because the vessels plaintiff worked aboard were not under common ownership or control. Id. at 1208. See also Langston v. Schlumberger Offshore Servs., 809 F.2d 1192, 1194 (5th Cir. 1987) (plaintiff who performed jobs for ten unrelated owners aboard fifteen different vessels not a seaman). Likewise, the vessels Coats worked on were owned by the customers of MIS. MIS did not own or control these vessels. Therefore, the district court correctly determined that Coats did not work for a fleet.

Second, by failing to include the transcript of trial in the record, Coats has waived his contentions regarding the sufficiency of the evidence to support the jury's finding of contributory negligence and the directed verdict for Penrod and MIS on the issue of punitive damages under general maritime law. Rule 10(b)(2) of the Federal Rules of Appellate Procedure requires an appellant who intends to argue that a finding or conclusion is unsupported by the evidence or contrary to the evidence to include a transcript of all relevant evidence. Fed. R. Civ. P. 10(b)(2). Defendants' appeals only pertain to pre-trail rulings of law and therefore neither needed the trial transcript for its arguments, and they did not order it. Therefore, Coats was

required to include the transcript to challenge the jury's finding of contributory negligence and the directed verdict. Because the transcript is not in the record, we cannot consider these arguments.

Third, Coats has also waived his claim for prejudgment interest. Prejudgment interest may only be awarded for past damages, but Coats did not request a segregation of past and future damages in the jury interrogatories. See Brister v. AWI, Inc., 946 F.2d 350, 362 (5th Cir. 1991).

We finally consider whether the district court abused its discretion in failing to award certain costs to Coats. Coats submitted a Bill of Costs for $34,405.25, and the Clerk taxed that

amount against defendants. After defendants moved the court to review the taxation of costs, the court agreed that the costs were excessive and instructed the parties to attempt to reach a compromise on a lower amount. After their efforts to compromise failed, the district court awarded $7,889.04. Coats contends for an additional $23,937.34.

Rule 54(d) of the Federal Rules of Civil Procedure provides for an award of costs "to the prevailing party unless the court otherwise directs." Fed. R. Civ. P. 54(d). 28 U.S.C. §1920 defines recoverable costs,[14] and a district court

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[14] 28 U.S.C. §1920 lists:
(1) fees of the clerks and marshals;
(2) fees of the court reporter for any and all of the stenographic transcript necessarily obtained for use in the trial;
(3) fees and disbursements for

may decline to award the costs listed in the statute but may not award costs omitted from the list. Crawford Fitting Co. v. J.T. Gibbens, Inc., 107 S.Ct. 2494, 2498 (1987). "Only when a clear abuse of discretion is shown can an award of costs be overturned." In re Nissan Anti-Trust Litigation, 577 F.2d 910, 918 (5th Cir. 1978); see also Fogleman, 920 F.2d at 285-87.

Coats claims an additional $1,179.14 for the cost of obtaining transcripts of several depositions. Under §§1920(2) and

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printing and witnesses;
(4) fees for exemplification and copies of papers necessarily obtained for use in a case;
(5) docket fees under §1923 of this title; and
(6) compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses and costs of special interpretation.

(4), prevailing parties are entitled to the costs of original depositions and copies if "necessarily obtained for use in the trial." We do not require that a deposition be actually introduced into evidence to meet this requirement.

> If, at the time it was taken, a deposition could reasonably be expected to be used for trial preparation, rather than merely for discovery, it may be included in the costs of the prevailing party. Similarly, a deposition copy obtained for use during trial or for trial preparation, rather than for the mere convenience of counsel, may be included in taxable costs. Whether a deposition or copy was necessarily obtained for use in the case is a factual determination to be made by the district court. We accord great latitude to this determination.

Fogleman, 920 F.2d at 285. The district court awarded $3,548.45 for depositions it determined, as stated in its order, to be necessarily and reasonably obtained in

preparation for trial. Coats has not demonstrated that the district court's determination of which depositions were necessary was a clear abuse of discretion.

The district court denied Coats' request for trial expenses in the amounts of $711.69 and $642.35, $1,744.96 for "blow-ups" used at trial, and $1,175.00 in video technician fees incurred for video depositions. These expenses are not included in §1920 and therefore are not recoverable.

Coats seeks payment of a witness fee, $87.50, and expert fee, $1,232.65, for an expert who attended trial but did not testify as a result of the court's directed verdict and $3,298.84 for a foreign law expert. Because the expert witness did not testify, we find no clear

abuse of discretion in the refusal to tax the witness fee. Additionally, expert fees are not recoverable. See 28 U.S.C. §§1821, 1920; Crawford, 107 S.Ct. 2494.

Coats also claims $518.65 for certified copies of various documents and the cost to photocopy certain documents attached to depositions in the amounts of $1,831.73 and $121.88. The cost of these copies may be taxed if the copies were "necessarily obtained for use in the case." 28 U.S.C. §1920(4). The district court awarded $3,045.63 for copies and exemplifications it determined, as stated in its order, to be necessarily and reasonably obtained. We will not disturb the court's determination of which copies were necessary.

Finally, Coats claims an additional $11,392.95 for the "[c]opy cost of pleadings, correspondence and documents necessary due to defense counsel's 'paper war.'" According to Coats' Bill of Costs, almost all of this amount covers "in-house" copying. We cannot judge the necessity of these expenses without a more specific statement. In any event the district court was in the best position to assess the equities of the alleged "paper war."

AFFIRMED.

DeMOSS, Circuit Judge, dissenting:

I am unable to concur with the decision of my colleagues in one crucial respect: I think proper evaluation of the Lauritzen-Rhoditis factors requires that

the choice of law determination in this case be made in favor of the law of the United Arab Emirates (UAE rather than that of the United States. My differences with the panel on the Lauritzen-Rhoditis choice of law factors involve the first factor, i.e. the place of the wrongful act; the fourth factor, i.e. the allegiance of the defendant ship owner; and the fifth factor, i.e. the place of the contract.

Looking first at the place of the wrongful act, the panel opinion devotes one sentence to analysis of this subject. It recognizes that "the accident occurred in the territorial waters of the United Arab Emirates" and that since this is a nontraditional maritime case," that factor is entitled to considerable weight. There is no doubt that Coats was injured while

on board the Penrod 69, a jackup drilling rig owned and operated by Penrod Drilling Corporation (Penrod). Where the Penrod 69 was at the time of the accident is ambiguously stated in the panel opinion. In the opening paragraph, the rig is described as being "off the coast of the United Arab Emirates, "but later on in the factual description it is described as being "located in the Port of Mina Saqr in the territorial waters of the United Arab Emirates." In my judgment there is a crucial difference between being "off the coast" and being "in port", for the latter necessarily implies that the vessel was within the boundary recognized for international law purposes as the boundary of the United Arab Emirates and within what would be referred to under United

States nomenclature as the "inland waters" of Ra's Al Khaymah, the particular emirate in which that port is located. We are talking about the Penrod 69 being within inland waters of Ra's Al Khaymah just like we would talk about it being within the inland waters of the State of Texas if it were in the Port of Galveston or within the inland waters of the State of Mississippi, if it were it the Port of Biloxi. Secondly, the Penrod 69 had been in these inland waters for some eight or nine months prior to the date of Coats' injury. The records are clear that on August 12, 1987, the Penrod 69 was surveyed for its annual condition certificate; and at that time, the survey report indicates that the "vessel lay jacked-up" in this port. The Penrod 69

was out-of-service, deactivated, not operated, and not occupied by any personnel other than a watchman, up until January 1988, when as a result of a new contract for its use in a Persian Gulf drilling activity, Penrod commenced the task of preparing Penrod 69 to go back into service. During this interval that it was deactivated, the Penrod 69 functioned solely as an artificial wharf or dock for the purpose of storing the equipment and facilities thereon, with its legs standing on the bottom of the port and its hull up out of the water. In accomplishing the refurbishing work, Penrod used its own personnel (assumptively the crew of the Penrod 69) and other categories of "contract labor, catering, and service personnel." MIS was

hired by Penrod to assist in the refurbishing work and MIS designated Coats to operate the MIS pump which was brought on board to provide pressure to test certain pressurized systems of the rig. The daily reports as to the personnel working on board the rig, which are in the record, reflect that the totals of contract labor, catering, and service personnel always exceeded the number of Penrod personnel. The record does not clearly indicate whether on the date of injury, April 12, 1988, the Penrod 69 was still in a "jacked-up" position, or whether its hull had been lowered into the water. Obviously, if it was still at a jacked-up position, its categorization as a "vessel" is in serious doubt. Even if it had been lowered into the water,

however, the nature and extent of the work going on, and the number of outside personnel deployed in such work, clearly demonstrate that the repair and refurbishing activities were beyond the capacity of the "crew" of the Penrod 69 to accomplish; and that such work could be accomplished only with the ready availability and access of shorebased personnel and facilities. In my view, under these facts, the "place of the wrongful act" element of the Lauritzen-Rhoditis factors should be given more than just "considerable weight" as the panel does. It should be the controlling factor in the choice of law decision. I have looked for and have been unable to find any Supreme Court decision or Fifth Circuit decision which has applied United

States law to resolve the claim of a shore-side worker injured while assisting in the refurbishing of a jacked-up drilling rig while it was located within the inland waters of another nation; and in my opinion the panel decision constitutes an unacceptable extension of United States law into areas where simple comity among nations requires that the law of the place of the casualty apply.

My second area of disagreement with the panel regarding the Lauritzen-Rhoditis factors concerns the factor of allegiance of the defendant shipowner. I do not quarrel with the panel's determination that the allegiance of Penrod as owner of the Penrod 69, is to the United States. But, in my view, the factor of "allegiance of the defendant shipowner" has

materiality only in the circumstance where the flag of the vessel and the allegiance of the defendant shipowner are different (i.e. the flag is a flag of convenience), and the law of the nation of allegiance of the defendant shipowner can appropriately be applied to the determination of rights between that shipowner and his seaman employee when that vessel is engaged in international commerce. In this case, however, the allegiance of the defendant shipowner is an inconsequential factor: first, because Penrod 69 is documented under the United States flag and Penrod"s allegiance is to the United States and there is no flag of convenience involved; and secondly, and more importantly, because both the district court and the panel opinion recognize that there was no

employment relationship as seaman, or otherwise, between Penrod and Coats. The majority's use of the allegiance of the defendant shipowner to tip the scales in favor of application of United States law would, in my judgment, be improvident even if the only defendant in this case were Penrod; because that factor should be applied only where there is an employment relationship between the injured plaintiff and the defendant shipowner. But, Penrod is not the only defendant in this case; and the other defendant, MIS, is not a shipowner; it is an entity whose allegiance is owed to the law of the United Arab Emirates; and it is in fact the employer of Coats. I am truly puzzled by the statement of the panel opinion that the allegiance of a MIS is "diminished

somewhat" because it has no employees from the UAE and a large percentage of its employees are from the United States. When, where, and how did the "allegiance" of a corporate entity come to be determined (or "diminished") by consideration of the citizenship or nationality of its employees? Does a corporation owe "allegiance" to any nation other than the nation which created it? Would the panel say that a corporation organized under the laws of the state of Delaware is not truly a Delaware corporation for purposes of our diversity law unless most of its employees are from Delaware? I have looked and have not found any Supreme Court or any Fifth Circuit decision which has applied United States law to determine the rights and

obligations between a citizen of the United States who is injured in a foreign country during the course and scope of his employment with a corporate entity organized under the law of that foreign country. In my judgment, the panel opinion improvidently extends Untied States law to the set of circumstances involved in this case by giving greater weight to the allegiance of the defendant shipowner instead of to the allegiance of the defendant employer.

Finally, I question the correctness of the panel decision in evaluating the place of contract factor in the Lauritzen-Rhoditis analysis. Here again, the majority misconstrues the significance of this factor. I recognize that Coats was recruited by representatives of MIS at his

home in Mississippi and that the basic terms of his employment agreement were negotiated and orally agreed upon during this recruitment visit. However, it is clear beyond doubt that he was recruited and "employed" to work in the United Arab Emirates and not aboard any vessel. Furthermore, it is clear that in order to get the necessary visa to enter the United Arab Emirates, Coats and MIS "executed an Arabic contract," and that Coats then applied for and received the necessary work permit from the UAE which would permit him to reside there during his employment. This circumstance of a work permit is a special factor present in this case which has not been present in any of the other choice of law cases cited in the majority opinion; and, in my view,

necessitates a determination that the law of the UAE should apply to an injury occurring in the UAE during employment under a work permit.

In his original appellee's brief, Coats argued: "U.S. Maritime Law applies whenever a U.S. citizen is injured on a U.S. flag drilling vessel anywhere in the world." (p. 52). The cases cited by Coats as precedent for that proposition do not support his assertion. But the majority opinion in effect arrives at the same conclusion by misinterpretation and misevaluation of the Lauritzen-Rhoditis factors. Because I think such a conclusion is bad law under the facts of this case, and will produce undesirable effects when applied as a precedent, I would reverse the district court's

judgment and remand the case to the district court for retrial in accordance with the laws of the United Arab Emirates.

In arriving at this result, I rely on the following line of Fifth Circuit cases: Chiazor v. Transworld Drilling Co., Ltd., 648 F.2d 1015 (1981); Zekic v. Reading & Bates Drilling Co., 680 F.2d 1107 (1982); Bailey v. Dolphin Intern., Inc., 697 F.2d 1268 (1983); Koke v. Phillips Petroleum Co., 730 F.2d 211 (1984); Schexnider v. McDermott Intern., Inc., 817 F.2d 1159 (1987); and Fogleman v. Aramco, 920 F.2d 278 (1991). All of these involve "nontraditional" vessels similar in nature and function to the Penrod 69 and all of which determined that the law of another nation, other than the United States, applied.

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NO. 93-1209

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1993

PENROD DRILLING CORPORATION

Petitioner

VERSUS

EARL WAYNE COATS

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

**BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI**

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RESPONSE TO PENROD DRILLING CORPORATION'S QUESTION PRESENTED FOR REVIEW

Earl Wayne Coats, plaintiff/respondent (hereinafter "Coats"), disputes that any question is presented for review before this Court at this time. The question which Penrod Drilling Corporation (hereinafter "Penrod") seeks to assert has been decided by the U.S. Fifth Circuit Court of Appeals, but is the subject of a Suggestion For Rehearing En Banc presently pending before that court. In that regard, the Suggestion For Rehearing En Banc of Penrod, statement of issues (presently pending), states:

> Whether, in a General Maritime Law case, the application of joint and several liability is incompatible with comparative fault and the requirement of justice that the parties stand as equals before the Court.

This is the same issue set forth in Penrod's "Question Presented For Review" in its Petition For Writ Of Certiorari.

Rule 11 of the Rules for the Supreme Court of the United States indicates that a petition for writ of certiorari to review a case pending in a United States court of appeals, before judgment is given in that court, will be granted only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate settlement in this Court. 28 U.S.C. §2101(e).

Penrod has not even argued that this is a case of such imperative public importance as to justify deviation from the normal appellate practice or that it requires immediate settlement in this U.S. Supreme Court. There is no question properly presented for review.

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RESPONSE TO JURISDICTIONAL STATEMENT

The jurisdictional statement of Penrod Drilling Corporation (hereinafter "Penrod") set forth herein is deficient. This is not a case contemplated within Rule 11 of the U.S. Supreme Court Rules and there has been no showing that this case is "of such imperative public importance as to justify deviation from the normal appellate practice and to require immediate settlement in this Court". (U.S. Sup.Ct. Rule 11)

There likewise has been no presentation of any special or important reasons for the granting of this writ as contemplated by Rule 10 of the U.S. Supreme Court Rules.

MISSTATEMENTS IN PETITION OF PENROD

In accordance with Rule 15.1 of the U.S. Supreme Court Rules, Earl Wayne Coats

(hereinafter "Coats") submits that the following are misstatements set forth in the Petition:

Penrod states at page 4 of its Petition that the jury found Penrod liable for only 20 percent of "the judgment amount". This is not correct. The District Court did not ask the jury to determine how much Penrod should pay. The jury contemplated that Coats would receive $740,000.00, together with interest and costs. The jury verdict form was prepared to allow the jury to give an award which would only be reduced by his percentage of fault.

After finding that the fault of Coats and Penrod each contributed 20 percent to his injuries, and the negligence of Hytorc M.E., Division of Maritime Industrial Services (hereinafter "MIS") contributed 60 percent to his injuries, the jury was asked the following question:

> 6. Please state, in dollars, the amount which will fairly compensate Earl Wayne Coats for the injuries which he sustained, without reduction for contributory negligence, if any.
>
> ANSWER: $925,000.00

The jury obviously contemplated that the amount which would fairly compensate Coats for his injuries was $925,000.00, reduced by 20 percent, or $740,000.00. Penrod did not object to the Jury Verdict Form or appeal any issue regarding language in the Jury Verdict Form.

Penrod presumes that, if given the opportunity to make the determination, the jury would have made an award of only $185,000.00 against Penrod. This is unsupported speculation and is not before this Court.

The next error/misstatement is set forth on page 5 of Penrod's Memorandum, in which it contends that the payment of $740,000.00 is four times the amount that

the jury cast Penrod in damages. As referenced on the Jury Verdict Form, Penrod was cast in judgment for $740,000.00 (together with interest and costs), the exact amount which Penrod should pay.

Penrod's next misstatement is that it would be "undeniably unfair and unjust" for the jury to cast Penrod in judgment for $740,000.00. This is not correct. Coats is a Sieracki seaman, a ward of the court and a maritime worker. In actuality, Penrod, who is presently doing business in the Persian Gulf where MIS is located, has a very good opportunity to get back from MIS (its client) whatever it is entitled to recover by way of contribution, after Penrod pays the judgment. Coats, in contrast, is a Mississippi native, hired in Mississippi, who went overseas to work under the supervision of Americans, injured on an American flag vessel, who was sent back to his home

state of Mississippi, where he is, was, and always will remain a permanent citizen. Coats does not have the business contacts or economic ability to go to the Persian Gulf area to collect the judgment from MIS; however, Penrod does. Fairness requires that Penrod pay the $740,000.00 judgment (together with interest and costs) rendered against it, in full.

The next misstatement in the Petition For Rehearing is set forth on page 7, which indicates that Coats was employed by "a United Arab Emirates corporation". The evidence showed that MIS was a United Arab Emirates ("UAE") corporation in name only. It was, in actuality, an entity set up and run by Americans. The ownership of the corporation was "in the name of" foreign nationals; however, the foreign nationals who owned MIS had no involvement in the operation, management or control, and essentially received ten percent of the

profits by allowing their names to be used as owners. MIS never even had any UAE employees.

Coats disagrees with the historical synopsis set forth on pages 10-12, et seq. of Penrod's Writ Application. Joint and several liability is and has been the rule in maritime cases for the past hundred years, and uniformly is set forth in decisions of the U.S. Supreme Court and all federal court circuits which have addressed the issue. This is not a "state law case" and there is no consensus among the states of the United States with regard to joint liability. In fact, numerous states take different approaches depending upon their policies, desires and choices. In contrast to the lack of uniformity in the state court system, the federal decisions have uniformly applied joint and several liability. Edmonds v. Compagnie Generale Transatlantique,

99 S.Ct. 2753, 2755, 2762 (1979), reh'g denied, 100 S.Ct. 194 (1979); Simeon v. T. Smith & Son, Inc., 852 F.2d 1421 (5th Cir. 1988), reh'g and reh'g en banc denied, 860 F.2d 1255 (5th Cir. 1988), cert. denied, 109 S.Ct. 3156 (1989).

Penrod's next misstatement is that there was a violation of instructions of U.S. District Judge Charles Pickering because Penrod was not treated "equally" to Coats. This is not correct. If Penrod was a plaintiff bringing a maritime claim against two defendants, then it would be entitled to obtain a joint and several judgment just as Coats did in this case (and just as every other plaintiff in maritime cases has done across the federal circuits for the past 100 years).

Another misstatement by Penrod is:

> No longer do a majority of jurisdictions in the country continue to apply the doctrine of joint liability, as was the case when Simeon, supra, was decided ....

This is not correct. All known jurisdictions do continue to apply the doctrine of joint and several liability -- in maritime cases. This, as admitted by Penrod in its Petition, at page 30, is a maritime law case. Therefore, the uniform maritime law must be applied.

Penrod misstates the facts surrounding Coats' employment on page 32 in numerous respects. Penrod says that Coats "accepted a job in the UAE", whereas the undisputed evidence is that Coats was hired and accepted his employment in Mississippi at his grandmother's house. Penrod states, at page 32, that Coats "had no reservation about going to the UAE to work for MIS". This is not correct. Testimony submitted at trial confirmed that in order to get him to leave his native state of Mississippi and go to the UAE, Mr. David Shelton, an American principal of MIS, told Coats that his job

overseas was "so easy that monkeys could do it". This was not true, and the jury found that MIS (and possibly Penrod) failed to provide proper training to Coats.

Penrod then states that Coats "has no complaint about going there [overseas] to collect his judgment". This is incorrect. The Original Brief submitted by Coats to the U.S. Fifth Circuit Court of Appeals specifically stated:

> Coats would simply reiterate to this [U.S. Appellate] Court that, without the joint and several liability rule, he will never collect from MIS. That is what Penrod is likewise trying to avoid because Penrod does not want to go through the trouble of collecting back what it might be required to pay as MIS's share. Penrod is certainly in a very good position, as the client of MIS, to collect back the share it is required to pay on behalf of MIS -- certainly Penrod is in a better position than Coats is in trying to collect ....

Coats complained about his inability to do what Penrod probably can do: collect from MIS.

Another misstatement is on page 32, where Penrod states:

> The fact that Coats was the injured party is equally his own fault as it was Penrod's and this fact affords him no additional rights.

Although confusing, this statement is inaccurate. Coats is a Sieracki seaman, as found by the jury, and this issue was not even appealed. He is an offshore worker -- a remnant Sieracki seaman, similar to the plaintiffs in Aparicio v. Swan Lake, 643 F.2d 1109 (5th Cir. 1981), and Cormier v. Oceanic Contractors, Inc., 696 F.2d 1112 (5th Cir. 1983), cert. denied, 104 S.Ct. 85 (1983). Coats has greater rights, as a ward of the court, than Penrod.

SIGNIFICANT INFORMATION OMITTED BY PENROD

Penrod did not inform the Court that the injury to Coats was so bad, so serious, so egregious and so disabling that neither defendant even appealed the award of quantum: $925,000.00.

Penrod failed to provide the Court with the full citation of Simeon v. T. Smith & Son, Inc., 852 F.2d 1421 (5th Cir. 1988), reh'g and reh'g en banc denied, 860 F.2d 1255 (5th Cir. 1988), cert. denied, 109 S.Ct. 3156 (1989).

Penrod failed to mention that the unanticipated explosion which occurred involved Penrod equipment which was defective and blew up injuring Coats.

Penrod did not disclose to the Court that Coats was a Sieracki seaman, entitled to a warranty of seaworthiness from Penrod under the General Maritime Law, and that the jury found that Rig No. 69 was unsea-

worthy and that unseaworthiness caused the injury to Coats.

ARGUMENT

The uniform application of joint and several liability is applicable in maritime cases. Edmonds v. Compagnie Generale Transatlantique, supra. Joint and several liability is the uniform maritime rule of the federal circuit courts. Joia v. Jo-Ja Service Corp., 817 F.2d 908, 917 (1st Cir. 1987), cert. denied, 108 S.Ct. 703 (1988); Zapico v. Bucyrus-Erie Co., 579 F.2d 714, 725 (2nd Cir. 1978); Simeon v. T. Smith & Son, Inc., supra, at 1431; Central Rivers Towing v. City of Beardstown, 750 F.2d 565, 575 (7th Cir. 1984); Shellman v. United States Lines, Inc., 528 F.2d 675, 680-681 (9th Cir. 1975), cert. denied, 96 S.Ct. 1668 (1976); Dodge v. Mitsui Shintaku Ginko K.K. Tokyo, 528 F.2d 669, 673 (9th Cir. 1975), cert. denied,

96 S.Ct. 1685 (1976); Drake Towing Co. v. Meisner Marine Constr. Co., 765 F.2d 1060, 1067 (11th Cir. 1985); reh'g and reh'g en banc denied, 773 F.2d 1239 (11th Cir. 1985); Ebanks v. Great Lakes Dredge & Dock Co., 688 F.2d 716, 722 (11th Cir. 1982), reh'g and reh'g en banc denied, 693 F.2d 135 (1982), cert. denied, 103 S.Ct. 1774 (1983).

Coats, as a Sieracki seaman and ward of the court, is entitled to the protections of maritime law, including the uniform "joint and several" liability rule.

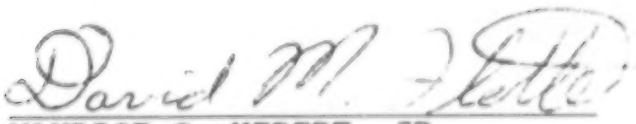
Penrod has a realistic opportunity to get its money back from MIS, whereas Coats does not have the business contacts or financial ability to pursue MIS overseas. The accident of Coats occurred almost five years ago, and Coats still has not seen any money from the judgment rendered herein or the jury verdict. With regard to equity, Coats should not have to wait

any longer for payment of what he is owed by defendants.

CONCLUSION

The Petition For Writ Of Certiorari should be denied.

Respectfully submitted,



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CERTIFICATE

I hereby certify that a copy of the above and foregoing Opposition Brief has served on all counsel of record, as set forth below, on this 10th day of February, 1994:

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